DIGEST OF IMPORTANT DECISIONS

REPORTED IN JANUARY, 1893.

[From the 1st to the 15th of January.]

CARRIERS AND TRANSPORTATION COMPANIES.

See MUNICIPAL CORPORATIONS, 2, 4. PROPERTY, 4.

COMMERCIAL LAW.

Cases selected by FRANCIS H. BOHLEN.

AGENCY.

1. *Authority—Usage and Custom.*

Where, in response to a telegram from an agent for the sale of fruits, asking a price, the principals, in reply, merely state a price, they are bound by a sale made by the agent at the price named, though not confirmed by them, and though their prior instructions to the agent only authorized him to sell subject to their confirmation; there being a custom or usage of the business to the effect that such a telegram is authority for the agent to sell finally and unconditionally, notwithstanding his prior instructions. Cawthorn *v.* Lusk, Supreme Court of Alabama, Nov. 9, 1892. HEAD, J., 11 So. Rep., 731.

BILLS AND NOTES.

2. *Consideration—Collateral Security for Pre-existing Debt—Bona Fide Holder.*

Where negotiable paper is transferred to secure a pre-existing debt, in consideration of an extension of the time of payment of the debt, the transferee is a *bona fide* holder for value, and is not subject to equities between prior parties, of which he had no notice.

In such a case notes afterward substituted by mutual agreement of the parties, without any new consideration, to take the place of the collateral originally taken, will be held in the same condition as the collateral whose place it took. First Nat. Bank *v.* Johnston, Supreme Court of Alabama, THORINGTON, J., November 3, 1892, 11 So. Rep., 690.

In Alabama the rule is that the holder of a negotiable instrument as security for pre-existing indebtedness is not *bona fide* holder for value (Wagner *v.* Simmons, 61 Ala., 143), unless there is some other consideration as here, the extension of time.

So among others in Pennsylvania (91 Pa., 339), New York (Coddington *v.* Bay, 20 Johns., 637), and Missouri (19 Mo., 106).

The opposite view is held in England (Nisa *v.* Currie, L. R., 1 App. Cas., 554), the Federal courts (Swift *v.* Tyson, 16 Peters, 1; 102 U. S., 25), and many States (Maryland, Indiana, etc.).

CONTRACTS.

3. *Breach of—Contract for Work and Labor—Remedy.*

A lithographic company contracted with a manufacturing company to make in the course of the year certain designs and sketches of its trade-

marks and plant, and to engrave same on stationery. Such contract is not contract of sale, but for work and labor, being to manufacture articles of special value to the manufacturing company, but useless to others; articles whose value is derived from the labor and skill bestowed on them and not from the materials used. In such contracts time is not ordinarily of the essence, and a failure to perform within stipulated time will not justify the aggrieved party in repudiating the entire contract, but merely gives him an action for damages for breach of stipulation.

In contracts for the sale of marketable articles time of shipment is a part of description of subject-matter, and is condition precedent on failure or non-performance of which the entire contract may be repudiated. See Norrington *v.* Wright, 115 U. S., 188. Beck & Pauli Co. *v.* Colorado Co., Circuit Court of Appeals, Eighth District, SANBORN, J., October 31, 1892, 52 Fed. Rep., 700.

4. *Implied—Parent and Child—Payment for Services.*

The law will not imply a promise to pay for services rendered by a son to an old and infirm parent, which, if rendered to a stranger, would raise an implied promise to pay. To entitle the son to compensation an express contract must be shown, or the circumstances be such as to show that it was the intention of both parties that compensation should be made and that the services were not performed from filial piety alone. So if the father, having agreed to leave his home to his son, if the son would reside with and care for him, and owing to an attack of insanity the father could not carry out his promise. the son having carried out his undertaking may recover on the express contract, the *quantum meruit* being the measure of damages he is entitled to receive: Hudson *v.* Hudson, Supreme Court of Georgia, LUMPKIN, J., November 21, 1892, 16 S. E. Rep., 349.

5. *Proposals for Bids—Liability to Bidder.*

A company making proposals for bids for building is not liable to lowest bidder for not awarding contract to him or any other bidder but doing the work itself, there being no promise to give contract to lowest bidder, but only to award it to lowest bidder, if at all: Reusch *v.* Brewing Co., Supreme Court of Louisiana, BREAUX, J., December 19, 1892, 11 So. Rep., 719.

SALE.

6. *When Title Passes—Priority of Mortgage.*

Where logs, sold on contract for delivery at a specified place, were not cut when the contract was made, the title thereto does not pass until after delivery, and a mortgage thereof before delivery will hold the same as against such purchaser: N. P. Lumbering Co. *v.* Kuron, Supreme Court of Washington, DUNBAR, J., November 18, 1892, 31 Pac. Rep.

7. *Conditional Sale—Right to Reclaim Property—Action for Price.*

Plaintiff's intestate sold certain machinery, taking a note from the vendee under an agreement that, on default of payment, the vendor might reclaim the machinery and remove it, and, if any portion of the

note should remain unpaid when possession should be so taken, then the amount which had been paid should be considered payment for the use of the machinery by the vendee, and the note should be canceled. *Held*, that the vendor could not adopt both remedies against the vendee, and that bringing an action on the note barred the right to reclaim the property: Crompton *v.* Beach, Supreme Court of Errors of Connecticut, FENN, J., April 1, 1892, 25 Atl. Rep., 446.

8. *Sale of Land—Recovery of Purchase Money Paid—Statute of Frauds.*

Money delivered under a contract for the sale of lands, which is void under the statute of frauds, is held by the vendor as money had and received for the use of the purchaser, and no previous claim by the purchaser can bar its recovery: Nelson *v.* Shelby Co., Supreme Court of Alabama, November 2, 1892, COLEMAN, J., 11 So. Rep., 695.

9. *Statute of Frauds—Insufficient Memorandum.*

A memorandum which sets out the terms of payment under a contract of sale as "one-third cash, and 'notes to be executed for the balance,'" is not sufficient to bind the vendor, in that there is nothing therein to show the number of notes to be given, interest therein, or date of payment. The Alabama code requires in contracts for the sale of land a memorandum of consideration signed by the party to be charged: Nelson *v.* Shelby Co., Supreme Court of Alabama, November 2, 1892, COLEMAN, J., 11 So. Rep., 695.

CONSTITUTIONAL LAW.

Cases selected by WILLIAM STRUTHERS ELLIS.

FEDERAL.[1]

INTERSTATE COMMERCE.

1. *Original Packages—State Regulation.*

The legislature of North Carolina, by Chapter 331 of the Acts of 1891, made it a misdemeanor for any persons doing business in the State to sell seed, etc., without plainly marking upon each bag or package containing the same the year in which the seed was grown—with a proviso excepting farmers selling seed in open bulk to other farmers or gardeners. Seed contained in packages not so marked was, in pursuance of a contract, shipped by a citizen of Michigan to a citizen of North Carolina, who sold it in the original packages to purchasers in the latter State. He was convicted under the above statute and presented an application for a writ of habeas corpus, alleging that the statute was unconstitutional as being a regulation of interstate commerce. *Held*, that since the traffic in seed is a subject in its nature national, requiring one uniform rule or plan of regulation, the inaction or silence of Congress is evidence of its intention that the commerce shall be untrammeled,

[1] During the temporary absence of Mr. Ellis the cases for this (February) number have been selected and abstracted by one of the Editors.

and the act in question, therefore, contravenes the commercial clause of the United States Constitution: *In re* Sanders, Circuit Court E. D. N. C., GOFF, Circ. J., November 14, 1892, 52 Fed. Rep., 802.

2. *Foreign Corporations—State Regulations—Interstate Commerce.*

A foreign corporation entered into a contract with a citizen of the State to sell goods to him at certain stipulated prices on credit, a bond, upon which the defendant was surety, being given to the corporation to secure payment for goods which might be sold under the contract. The corporation had not complied with the Act of the Arkansas Legislature of April 4, 1887, providing that before any foreign corporation shall begin business in the State it shall file a certificate in the office of the secretary of State designating an agent on whom process may be served, and stating its principal place of business in the State; and providing, further, that a failure to comply with these requirements shall avoid contracts with citizens of the State. In a suit by the corporation to recover on the bond, it was *held* that the transactions of the parties were acts of interstate commerce, and could not be affected by the Act of legislature. Gunn *v.* White Sewing Machine Co., Supreme Court of Arkansas, BATTLE, J. (COCKRILL, C. J., and MANSFIELD, J., dissenting) December 3, 1892, 20 S. W. Rep., 591.

3. *Inspection Laws of States—Taxation of Imports—Powers of Federal Courts—Police Power.*

By Chapter 9, Public Laws of North Carolina, 1891, the legislature o that State imposed a tax of twenty-five cents per ton upon fertilizers to defray the expenses of inspection. *Held*, that this was, in effect, a law to provide for the security of purchasers in buying articles whose contents and qualities cannot be determined by ordinary inspection, and that whether it be called an inspection law or an exercise of the general police power of the State, it was constitutional, although imposed upon things not grown or produced in the State enacting it. Such a tax is not in itself so unreasonable or excessive as to evidence an intent to evade the prohibition of the Federal Constitution upon the taxation of imports by the States: Patapsco Guano Co. *v.* Board of Agriculture of North Carolina, Circuit Court, Eastern District of North Carolina, SEYMOUR, D. J., September 24, 1892, 52 Fed. Rep., 690.

STATE.

ATTORNEYS.

4. *Occupation Tax—License to Practice.*

Section 1, Article 8, of the Constitution of Texas authorizes the legislature to impose taxes on the occupation of natural persons and corporations "doing business in the State. . . . Persons engaged in mechanical and agricultural pursuits shall never be required to pay an occupation tax." Under this authority the legislature may impose an occupation tax on lawyers and subject them to criminal prosecution and fine for practicing without paying the tax and taking out a license. Such a tax is constitutional, as lawyers are not constitutional officers, their

office being for life; and even if they were they would be taxable, since the State has a right to tax the salaries and compensation of her own officers. Nor is the tax a violation of the provision that the accused shall have the right to be heard by himself or counsel; nor does such a tax violate the constitutional provision that all taxes shall be equal and uniform, since all members of the profession are alike subjected to it. A license to practice is, indeed, a vested right, but unless there is something in the privilege by which the State has relinquished the right of taxation, it is presumed that the license was accepted subject to the power of the State to impose the tax, and therefore the act in question does not impair the obligation of contract. *Ex parte* Williams, Court of Criminal Appeals of Texas, SIMKINS, J., November 19, 1892, 20 S. W. Rep., 580.

LEGISLATURE.

5. *Legislative Finding of Fact—Review by Judiciary.*

Section 31, Article 6, of the Constitution of Missouri, gives the general assembly power to establish criminal courts in counties having a population exceeding fifty thousand. By an Act of assembly such a court was created for Greene County, and a prisoner was convicted therein. On an application for a habeas corpus he contended that the court had no legal existence, since the census of 1890, taken before the passage of the Act, and the census of 1890, taken thereafter, showed that the population of the county was less than fifty thousand. *Held*, that where, as here, the legislature has determined a question of fact upon which its power to enact a given law is dependent, such finding of fact will not be investigated by the judiciary in a collateral proceeding. Renfrow *v.* Day, Supreme Court of Missouri, BRACE, J., December 12, 1892, 20 S. W. Rep., 682.[1]

CORPORATIONS.

Cases selected by JOHN A. MCCARTHY.

See CONSTITUTIONAL LAW, 2, 3. PRACTICE, 4.

INSOLVENT CORPORATIONS.

1. *Trust Fund Theory—Preferred Creditors.*

Proceedings to foreclose a deed of trust executed by an insolvent corporation in favor of its president and three directors to secure *bona fide* advances, was resisted by a judgment-creditor, junior to the deed, as being fraudulent as to him. It was held: (1) In the absence of statute prohibiting it a corporation in failing circumstances may make preferences among its creditors by assigning all or a part of its property to preferred creditors or to trustees for their benefit. The deed was, therefore, valid as a preference. (Following *ex parte* Conway, 4 Ark., 302; Ringo *v.* Biscoe, 13 Ark., 563.) (2) While it is undoubtedly true that the property of a corporation is in one sense a trust fund for the payment

[1] See Vanfleet on Collateral Attack, Section 20 (Callaghan & Co., Chicago, 1892, reviewed *infra*, p. 184).

of its debts, yet this means no more than that the property of the corporation cannot be distributed among its stockholders or applied to any purpose foreign to the legitimate business of the corporation until its debts are paid. The *accident* of a director being a *bona fide* debtor of the corporation does not affect the application of the general rule. (Following Fogg *v.* Blair, 133 U. S., 534, 10 Sup. Ct. Rep., 338; Graham *v.* R. R., 102 U. S., 148–161.) (3) The deed is not void because made in favor of the directors and president of the road when it is shown that their advances were *bona fide* and apparently the only source of the corporation's credit. (Following Hallam *v.* Hotel Co., 56 Ia., 178, 9 N. W. Rep., 111; Smith *v.* Skeary, 47 Conn., 47; Duncombe *v.* R. R., 84 N. Y., 190; Reichwald *v.* Hotel Co., 106 Ill., 439; Richardson's Excr. *v.* Green, 133 U. S., 439, 10 Sup. Ct. Rep., 280). Gould *v.* Little Rock, etc., Railway Co., Circuit Court of United States for Arkansas, October 28, 1892, 52 Fed. Rep., 680.

PRINCIPAL OFFICE.

2. *Taxation.*

A steamship company engaged in traffic on the lakes had an office outside of the city of Milwaukee, in the town of Lake, where there was a sign with the name of the corporation thereon, and at which the annual election of officers was held. No other business was transacted at this office. The president and secretary of the company carried on an insurance business as partners in Milwaukee. The company's books were kept at their office, and through it all the business and financial affairs of the company were transacted. It was held that for the purposes of municipal taxation the principal office of the company was in the city of Milwaukee and its property was properly assessed therein: Milwaukee S. S. Co. *v.* City of Milwaukee, Supreme Court of Wisconsin, December 6, 1892, 53 N. W. Rep., 839.

CRIMINAL LAW.

Cases selected by C. PERCY WILLCOX.

BURGLARY. See CRIMINAL PRACTICE, 1, 2.

PERJURY.

1. *Essentials of.*

If the Court have jurisdiction of the subject-matter of an action, and power to administer an oath to a witness therein, a false statement made by him under oath will constitute perjury, even though the jury in such action have not been properly sworn: Smith *v.* State, Court of Criminal Appeals of Texas, December 3, 1892, per HART, P. J., 20 S. W. Rep., 708.

CRIMINAL PRACTICE AND PROCEDURE.

Cases selected by C. PERCY WILLCOX.

INDICTMENT.

1. *Sufficiency—Allegation as to Time.*

Where an indictment for burglary, in the usual form, alleges that the

offense was committed on a certain day, "about the hour of twelve o'clock in the night of that day," it clearly means in the night after sundown of that day, and is sufficiently certain as to time.

2. *Sufficiency—Conformity with Statute.*

A sheriff's office is a "house," within Pen. Code, Art. 704, which defines the crime of burglary as being the entry of a "house" by force, etc.; and hence an indictment which charges defendant with breaking into the sheriff's office, and also into a vault therein, is sufficient, though it does not use the precise language of the statute, and allege the sheriff's office to be a house.

And where an indictment for burglary charges the theft of specific articles, an averment that the breaking was done "with intent to commit a theft" is sufficient, without setting out the essential elements of theft. Bigham *v.* State, Court of Criminal Appeals of Texas, November 5, 1892, per SIMKINS, J., 20 S. W. Rep., 577.

3. *Sufficiency—Statement of Offense.*

Although it is provided by the General Statutes of Connecticut that "every person who shall wilfully injure any public building, house of worship, college or schoolhouse, shall be fined," etc., yet a complaint charging that a defendant did wilfully injure "a certain public building and house of worship," although in the language substantially of the statute, is insufficient in failing to show particularly the manner of the injury; for it is a general rule of criminal pleading that every information or indictment must contain a statement of all facts and circumstances constituting the crime with particularity and certainty. It has been stated in many cases that in an information for a statutory offense it is sufficient to allege it in the words of the statute. But such statement is never intended to be a relaxation of the general rule as above given, because in all cases the offense must be set forth with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged. State *v.* Costello, Supreme Court of Errors of Connecticut, June 30, 1892, per Andrews, C. J., 25 Atl. Rep., 477.

JUDGE.

4. *Disqualification—Hostility to Defendant.*

Previous to a second trial of defendant for murder he moved the judge to retire from the bench, and not preside in the case, filing an affidavit that after the first trial the judge criticised to divers persons those of the jury who favored defendant, and announced defendant's alleged crime as the most bloodthirsty ever committed; that the judge knew that there was a rabid and unhealthy feeling against defendant, and expressed in the presence of crowds, and during an election campaign, in which the judgeship was one of the contested offices, his opinion as to defendant's guilt; and, being personally hostile to defendant, ruled so as to satisfy the bloodthirsty crowd. *Held*, that the failure of the judge to vacate was error: Massie *v.* Commonwealth, Court of Appeals of Kentucky, December 13, 1892, per BENNETT, J., 20 S. W. Rep., 704.

NEW TRIAL.

5. *Grounds—Misconduct of Jury.*

Upon the trial of an indictment for murder. After the case was submitted to the jury, some of the jurors were allowed to stand on the court-house porch, where they could hear citizens discussing the merits of the case, and insisting on defendant's guilt. *Held*, that the facts set forth were sufficient ground for setting aside a verdict of guilty, and granting a new trial: Vaughan *v.* State, Supreme Court of Arkansas, December 3, 1892, per COCKRILL, C. J., 20 S. E. Rep., 588.

EQUITY.

Cases selected by ROBERT P. BRADFORD.

MORTGAGES. See COMMERCIAL LAW, 6.

1. *Receiver of Rents and Profits.*

It results from the fact that a mortgage is only a security for a debt that a mortgagor in possession is to be treated as the owner of the property. A receiver of the rents and profits will not, therefore, be appointed unless their preservation is necessary to the mortgagee's security: Lindsay *v.* American Mortgage Co. of Scotland, Supreme Court of Alabama, HEAD, J., November 21, 1892, 11 So. Rep., 770.

SUBROGATION.

2. *Voluntary Payment.*

M., the owner of a mortgage, loaned it to a bank for temporary use, to sustain its credit when in a financial strait. The bank pledged the mortgage with a creditor as collateral security, and subsequently pledged with the same creditor commercial paper, owned by it, as collateral security for the same debt. Afterward the bank made a general assignment for the benefit of creditors. The mortgagor then voluntarily paid the amount of the mortgage to the pledgee, who applied the money toward the debt of the bank. The pledgee collected the commercial paper, and, after full satisfaction, there remained a balance therefrom in the pledgee's hands. *Held:* That by right of subrogation M. was entitled to this balance as against the voluntary assignee: Matthews *v.* Fidelity Title and Trust Co., Circuit Court, Western District of Pennsylvania, ACHESON, J., August 4, 1892, 52 Fed. Rep., 687.

TRUSTS. See COMMERCIAL LAW, 8.

EVIDENCE.

Cases selected by ARDEMUS STEWART.

CONSPIRATORS, ACTS OF.

1. *Conversation with Confederate.*

On a prosecution for the theft of hogs, evidence by the State, showing that defendant and a confederate agreed to get the hogs; that they

together drove them six or seven miles to defendant's place, and put them in his pen; and that they together disposed of them on the following day, establishes a conspiracy, and renders admissible in evidence a conversation between a third person and defendant's confederate, shortly before the theft, in which he was informed as to the ownership of the hogs, though such conversation did not take place in defendant's hearing: Smith *v.* State, Court of Criminal Appeals of Texas, DAVIDSON, J., November 2, 1892, 20 S. W. Rep., 576.

MOTIVE.

2. *Conviction for Similar Offences.*

On a prosecution for assault with intent to murder, where the evidence connecting defendant with the crime is purely circumstantial, evidence of another assault, committed on the prosecuting witness by defendant a few months before the one in question, and the record of defendant's conviction for such assault, are admissible to prove motive: Crass *v.* State, Court of Criminal Appeals of Texas, DAVIDSON, J., November 30, 1892, 20 S. W. Rep., 579.

OPINION.

3. *Expert—Real Estate Broker—Value of Land.*

In order to render the opinion of a witness competent evidence, he must appear to have special knowledge on the subject of inquiry. An ordinary real estate agent is not competent to give his opinion as evidence upon the value of the private title in a strip of land lying in a public highway, and separated by the street from private property; nor is such an agent competent to give his opinion as evidence upon the damages which should be paid to the owner of the abutting property on the condemnation of such a strip for railroad purposes: Laing *v.* United New Jersey Railroad and Canal Co., Court of Errors and Appeals of New Jersey, DIXON, J., November 17, 1892, 25 Atl. Rep., 409.

RELEVANCY.

4. *Res Gestæ—Explanatory Statement.*

In an action by a husband for alienation of the wife's affections it was proper for defendant, as part of the *res gestæ*, to show what the wife, when exhibiting to her parents wounds and bruises claimed to have been inflicted by the husband on occasions before or during her acquaintance with defendant, had said of their effect upon her feelings toward the husband, and what she had said also after leaving her husband's house for that of defendant as to her fears of bodily injury, etc. Rudd *v.* Rounds, Supreme Court of Vermont, ROSS, C. J., August 25, 1892, 25 Atl. Rep., 438.

5. *Res Gestæ—Facts Forming Part of Same Transaction.*

On a trial for assault with intent to kill, the prosecuting witness cannot testify that he told the first persons who reached him after he was shot who did it, as such conversation is not part of the *res gestæ*. Loyd *v.* State, Supreme Court of Mississippi, COOPER, J., October 17, 1892, 11 So. Rep., 689.

WITNESS.

6. *Credibility of Witness—Habit of Drinking.*

On a trial for the unlawful sale of intoxicating liquor, the fact that a witness is in the habit of drinking beer does not affect his credibility, and the admission of evidence of that fact is error. People *v.* Kahler, Supreme Court of Michigan, MCGRATH, C. J, December 2, 1892, 53 N. W. Rep., 826.

7. *Refreshing Memory—Use of Documents.*

Schedules of prices fixed by dealers from year to year, which prices are the established prices in the trade, may be used by witnesses called to state the fair retail price of goods sold, it being shown that it was impossible for any one to carry the prices of all the articles in his mind. Such evidence could not be excluded on the ground that it was not competent to prove that plaintiff's prices were excessive except by persons in the same line of business, since the question was whether the prices were excessive, and any evidence proving the true value of the materials was competent. Nelson *et al. v.* Columbian Iron Works and Dry Dock Co., of Baltimore City, Court of Appeals of Maryland, BRYAN, J., November 18, 1892, 25 Atl. Rep., 417.

INSURANCE.

Cases selected by HORACE L. CHEYNEY.

FIRE INSURANCE.

OVER-INSURANCE.

1. *Additional Policy Obtained through Mistake.*

The plaintiff procured several policies of insurance upon a building, all of which provided that "$15,000 total concurrent insurance permitted." One of these policies was dated October 28, 1890, and recited that it was for a period of one year from that date, but stated by mistake that it would expire on October 28, 1890. The insurance agents from whom plaintiff obtained his insurance, misled by the recitals in the above policy, and believing it to have expired, informed him, when they delivered the policy in suit, that his total insurance was under the limit by $2,500, the face of the policy erroneously supposed to have expired, and, in reliance on such statement, plaintiff procured an additional policy of $2,500. *Held*, that such additional policy, applied for and obtained through such a mistake, did not vitiate the older insurance, but that it is not itself collectible. Boulden *v.* Phenix Ins. Co., Supreme Court of Alabama, STONE, C. J., November 3, 1892, 11 So. Rep., 774.

PROVISIONS OF POLICY.

2. *Waiver by Agent Binding upon Company.*

Where the agent of defendant insurance company, clothed with full power to issue policies, and who was also the legal adviser of plaintiff, and knew the condition of her property, procured and assented to the placing of a chattel mortgage on the property, but did not indorse such assent on the policy, the defendant insurance company is estopped from

denying its liability under the policy; it being presumed to have the knowledge of its agent, even though the policy contained a provision that it would be void if the property became incumbered by a chattel mortgage, unless assent was indorsed thereon, and the further provision that no agent had power to waive a provision or condition. Beebe *v.* Ohio Farmers' Ins. Co., Supreme Court of Michigan, LONG, J., December 3, 1892, 53 N. W. Rep., 818.

MARINE INSURANCE.

TOTAL LOSS.

3. *Abandonment—Jettison of Cargo.*

Under a marine policy insuring against "absolute loss only," a partial loss cannot not be converted into a constructive total loss, and evidence of abandonment is immaterial, and a jettison of cargo, either to lighten the ship or for the purpose of being saved, does not of itself constitute an "absolute total loss" within the meaning of a marine insurance policy, when part of the goods are in fact saved. Monroe *v.* British and Foreign Marine Ins. Co., Limited, Circuit Court of Appeals of United States, First Circuit, PUTNAM, J., October 5, 1892, 52 Fed. Rep., 777.

MUNICIPAL CORPORATIONS AND PUBLIC LAW.

Cases selected by MAYNE R. LONGSTRETH.

CITY ORDINANCES.

1. *Validity.*

A city ordinance which declares that it shall hereafter not be lawful for anyone to set up or establish a private market for the sale of meats, fish, vegetables, etc., "without permission of the city councils," but which does not enumerate any requisites to obtain permission, is illegal and void, because it is not general and impartial, and the discretion vested by such ordinance in the city council is in no way regulated or controlled by conditions upon which the permission shall be granted, leaving it within the power of the council to grant or refuse the privilege at pleasure, influenced by partisan, race and personal considerations: State *v.* Dubarry, Supreme Court of Louisiana, December 19, 1892, 11 So. Rep., 718. Based upon Yick Co. *v.* Hopkins, 118 U. S., 356.

COUNCILS.

2. *Consent to Use of Streets by Electric Railways.*

Where a city by an ordinance of councils consents to the operation of a street railway by overhead electric wires, and the company owning the railway is especially named in the ordinance, but the company to which the railway is leased for a term of years is not mentioned, the consent of the city to the use of electricity as a motor to the lessee company is sufficiently declared. In such a case the consent of councils was that the thing should be done by two corporations acting together as one, and such consent, whether it named one or the other, was meant to be operative as to both: Reeves *v.* Philadelphia Traction Co., Supreme Court of Pennsylvania, MITCHELL, J., January 3, 1893, 152 Pa. St., 153; 31 W. N. C., 265.

ELECTIONS.

3. *Promulgating Election Returns.*

The duties of the Secretary of State in promulgating the returns of the election are purely and exclusively ministerial, and he has no discre tion whatever to question the accuracy of the clerk's certificate, to vary or contradict it, but must promulgate from the official returns certified to as correct by the clerk, without changing a name or omitting returns believed to be based on fraudulent and illegal voting: State *v.* Mason, Supreme Court of Louisiana, MCENERY, J., December 5, 1892, 11 So. Rep., 711.

4. *Use by Railroad Company.*

The construction and operation of a railroad at grade in a public street under municipal authority, is not a new use of the street for which compensation may be demanded by abutting owners, as in the case of property "taken or damaged" within the meaning of Art. II, Par. 21 of the Constitution: Henry Gauss & Sons Manfg. Co. *v.* St. Louis, K. & U. W. Ry. Co., Supreme Court of Missouri, MACFARLANE, J., December 15, 1892, 20 S. W. Rep., 658.

POLICE POWER.

5. *Fire Limits.*

A borough charter empowering its burgesses "to provide adequate protection against fire" does not authorize the establishment of fire limits within which the erection of wooden structures may be prohibited. Such restrictions are invasions of private right and can only be imposed where the power has been expressly given: Pratt *v.* Borough of Litchfield, Supreme Court of Errors and Appeals of Connecticut, TORRANCE, J., June 30, 1892, 25 Atl. Rep., 461.

NOTE.—The general rule in this country is that municipal corporations have the power, under the general welfare clauses usually contained in their charters, without express legislative grant, to establish fire limits forbidding the erection of wooden structures therein, as it is a power connected with the purposes for which such corporations are organized: Baumgartner *v.* Hasty, 100 Ind., 575; Ford *v.* Thrailkell, 27 A. & E. Corp. Cas., 576 Ga., 1889; Com. *v.* Tewksbury, 11 Met., 55; King *v.* Davenport, 98 Ill., 305; *Ex parte* Fiske, 72 Cal., 125; Mayor *v.* Hoffman, 29 La. Ann., 651; Knoxville *v.* Bird, 12 Lea., 121; Charleston *v.* Reed, 27 W. Va., 681. In a few States, however, the power to pass such ordinances is held not to exist unless expressly given by the legislature: Des Moines *v.* Gilchrist, 67 Va., 210; Rye *v.* Peterson, 45 Tex., 312; State *v.* Shuchardt (La., 1890), 7 S. R., 67. In other States power to establish fire limits is expressly or impliedly given by general municipal corporation acts: Klinger *v.* Bickel, 117 Pa. St., 326; Ford *v.* Thrailkill, 27 A. & E. Corp. Cas., 576 (Ga., 1889).

MUTUAL RELATIONS.

PARENT AND CHILD. See COMMERCIAL LAW, 4.

PATENTS.

Cases selected by HECTOR S. FENTON.

ABANDONMENT OF PATENT.

1. *Public Use by Inventor before Application.*

The plaintiff, in the expectation of being employed by a railroad company as engineer to construct a cable road, devised the system afterward patented to him in 1882, and actually constructed such a road in the city of San Francisco in 1878, which was then successfully tested and operated for profit; but doubts on his part as to its continued successful operation, and the discovery by him in 1879 of supposed slight defects in the structure, rendered him uncertain as to the success of the device until 1881, though he did not express these doubts and uncertainties to any one, nor take any steps to remedy the supposed defects. *Held*, to be a continued public use and not experimental and, therefore, constituting an abandonment, sufficient time having elapsed to test the structure and apply for a patent within the limit of two years after the road was laid: Root *v.* Third Ave. Co. R. Co., Sup. Ct. U. S. (affirming C. C. U. S. So. Dist. N. Y., 37 Fed. Rep., 673). Decided November 21, 1892, 13th Sup. Ct. Rep., 100.

DESIGN PATENTS.

2. *Patentable Subject-matter.*

Plaintiff conceived the idea of placing an old ornament upon an album case of which he was not the inventor, the form the alleged invention took being an album case set on a base board in an upright position, having on its exterior an oval ornamental frame with an open centre. *Held*, avoiding the patent, that Clause 3 of Sec. 4929, Rev. Stat., authorizing patents for designs, contemplated only designs for articles of manufacture and for designs to be placed upon or worked into such articles, and not for the mere placing of an ornament upon such articles: Berguer *v.* Kaufmann, So. Dist. N. Y., WHEELER, J., November 29, 1892, 52 Fed. Rep., 818.

INFRINGEMENT.

3. *Bill for Pleading—Averment of Title—Allegation of Non-prior Use and Sale.*

On demurrer to a bill for infringement which averred that "the alleged invention had not been in public use or on sale for more than two years *with his consent or allowance*," and had set up title in the plaintiff at a specific date without averring continued ownership of the patent at the time of suit brought. *Held*, sustaining the demurrer, that the bill was defective in both particulars: Krick *v.* Jansen, So. Dist. N. Y., TOWNSEND, D. J., August 25, 1892, 52 Fed. Rep., 823.

4. *Contributory—Procurement by Defendant of Breach of License by Licensee.*

Patentees had granted licenses to A and others to use patented machines purchased of them, conditioned that the special material used thereon should be purchased of the licensors. Defendant had procured and induced A and other licensees to violate this condition by purchasing such special material of defendant to be used upon said machines. The bill sought to charge the defendant with actively contributing to an infringement, and prayed an injunction. Defendant demurred. Demurrer overruled, and on motion for injunction, *pendente lite*, heard with the demurrer: *Held*, that the defenses urged on behalf of the defendant that the patentees' remedy was solely against his licensee, as for breach of contract; and that the restriction in the license was in restraint of trade, and hence contrary to law in that it sought to establish in the plaintiff a monopoly in the sale of unpatented articles, viz.: the special material used upon the machines, were not tenable, and that the injunction should be granted. Heaton Peninsular Button-Fastener Co. *v.* Dick *et al.*, United States Circuit Court, Ninth District of Illinois, JENKINS, D. J., July, 1892, 52 Fed. Rep., 667. (An exhaustive collection of authorities is appended to the report of this case.)

5. *State of Art—Construction of Claim—Novelty—Mechanical Skill.*

In suit on two patents issued in sequence to the same patentee on substantially the same generic device, the state of the prior art requiring a narrow construction of the claims of the first patent: *Held*, that such view is sustained by the patentee's declarations in the second patent differentiating between the two. *Held*, also, that the specific form of slot claimed in the second patent to admit the passage of a known specific form of staple, was not novel or patentable, it being obvious and requiring mechanical skill only, to adapt the slot in charge to admit the staple: Phila. Novelty Co. *v.* Weeks, So. Dist. N. Y., COXE, J., December 2, 1892, 52 Fed. Rep., 816.

6. *State Statutes of Limitations.*

An action at law was brought more than three and less than six years after the expiration of the patent alleged to have been infringed by the defendant, who pleaded the State Statute of Maryland, barring actions on the case after three years. On demurrer of the plea, *Held*, that while the Court thought Section 721, Rev. Stat., establishing limitations in other cases applied to actions on patents, in view of recent previous decisions to the contrary by courts of co-ordinate jurisdiction, following the doctrine of comity, overruled the demurrer: Briskill *v.* City of Baltimore, U. S. Circuit Court, District of Maryland, November 11, 1892, MORRIS, D. J., 52 Fed. Rep., 737.

7. *Recision of—Intention.*

After application filed and before patent granted, the plaintiff exhibited to the defendant a machine said to represent the invention for which the patent was applied and had then been allowed but not yet

issued. Defendant thereupon entered into a royalty contract reciting these facts and granting, *inter alia*, to the defendants an exclusive license to manufacture the invention for the term of the patent to be issued, the licensee covenanting to pay a royalty semi-annually on all specimens of the invention made and sold by him; and providing that if defendants "shall decide at any time that they do not wish to continue the manufacture and sale of said (invention) then this contract, or any lease or license issued under it, shall be surrendered to said (patentee) without damage to either party." The defendant soon after made quite a number of the patented machines. On the subsequent issue of the patent it was found not to contain any claim for the essential feature which, as was proven, had induced the defendant on the original examination of the plow to enter into the contract. Defendants thereupon notified the patentee that they would not proceed with the manufacture under the contract. The patent after issue was assigned to the plaintiff, and no license after such issue was ever given or offered to the defendant. Several defenses were made, but the case turned upon failure of consideration in that the patent subsequently issued did not protect defendant in the exclusive manufacture of a device embodying the features exhibited in the sample machine upon which the contract was made. In deciding the case for the defendant the Court held that it was not necessary, in acting under the surrender clause (quoted above), that the parties should actually have manually surrendered and cancelled the paper contract, if the conduct of the defendant was such as to manifest a clear and unequivocal intention so to do. Hunt *v.* Moline Plow Co., United States Circuit Court, Ninth District of Illinois, BLODGETT, D. J., October 31, 1892, 52 Fed. Rep., 745.

LICENSE.

8. *Royalties—Novation—Delivery of License—Waiver.*

Plaintiff agreed to deliver to defendants certain patented machines, together with a license reserving royalties, to use the same "themselves," or "by any other person for them or for others." Before delivery of the machines defendants organized and became sole stockholders of a corporation, to whom the machines, at defendant's request, were delivered. *Held*, reversing the Court below, in an action to recover the royalties, that the delivery to the corporation instead of to defendants did not constitute a novation, and being done with defendant's consent, neither extinguished the old obligation nor released the original debtors; nor did it constitute a breach of the contract, since the consent of the defendants as officers of the corporation estopped them from denying that the delivery was against their consent and implied request. *Held*, also, that the delivery of the machines under the contract to give a license reserving royalties, did not prevent a recovery for the royalties, notwithstanding that there was no delivery of the paper license, the omission being caused by the licensee's refusal or neglect to sign it. American Paper Bag Co. *v.* Van Nortwick *et al*, U. S. Circuit Court of Appeals, 7th Circuit, HARLAN, Circ. J., and WOODS and JENKINS. Decided October 1, 1892, 52 Fed. Rep. 752.

RE-ISSUE.

9. *New Element in Claim—Broadening Claim—"Same" Invention.*

Where the original patent was re-issued with a claim containing a new element introduced into the combination patented by one of the claims, which ordinarily would "narrow" the claim, *held*, in case of re-issue the patent was not for "the same invention" within the meaning of the statute, because the patentee must have described and *intended* to secure in the original the invention claimed in the re-issue: and that in legal contemplation the claim was "broadened" and is invalid if it thereby covers machines that were or could have been for more than two years previously used by innocent parties without infringement. Carpenter Straw Sewing Machine Co. *v.* Searle, *et al*, So. Dist. of N. Y., COXE, D. J., Nov. 15, 1892. 52 Fed. Rep., 809.

PLEADING.

Cases selected by ARDEMUS STEWART.

DECLARATION.

1. *Sufficiency.*

When a contract declared upon refers to another contract for its terms, and the latter is not set out in the declaration, no action can be maintained upon the former, and the declaration is demurrable: Toole *.v* Baer, Supreme Court of Georgia, *per curiam*, December 6, 1892, 16 S. E. Rep., 378.

PRACTICE.

Cases selected by ARDEMUS STEWART.

LAW.

ARBITRATION AND AWARD.

1. *Validity—Submission Pursuant to Church Rules.*

(1) An arbitration and award are none the less binding because made pursuant to the regulations of a church to which the parties belong.

(2) In a common-law submission to arbitration the arbitrators need not be sworn unless the parties demand it, and it will be presumed to have been dispensed with if not required in the submission: Payne *v.* Crawford, Supreme Court of Alabama, STONE, C. J., April 13, 1892, 11 So. Rep., 725.

CERTIORARI.

2. *Review of Official Action—Taxation.*

A taxpayer may prosecute a writ of certiorari to review any municipal or official action which tends to burden his taxing district with a debt. 22 Atl. Rep., 481, reversed: State (Middleton, Prosecutor) *v.* Robbins *et al.*, Court of Errors and Appeals of New Jersey, REED, J., November 20, 1892, 25 Atl. Rep., 471.

COURTS. See CONSTITUTIONAL LAW, 5.

3. *When "In Session"—Fees of United States Marshal.*

A circuit or district court is "in session," within the meaning of Rev. St. § 829, fixing the marshal's compensation for attending same "while in session," only when it is open by its own order for the transaction of business, and a marshal is not entitled, under such section, to be compensated at the rate of five dollars per day for each day of the term when the court by its own action is not open for the transaction of business. 24 Ct. Cl., 394, affirmed: McMullen *v.* United States, Supreme Court of the United States, HARLAN, J., December 5, 1892, 13 Sup. Ct. Rep., 127.

JURISDICTION.

4. *Federal Courts—Diverse Citizenship – Corporations.*

Under Act August 13, 1888 (23 St. at Large, p. 433), § 1, providing that, "where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either plaintiff or defendant," the Circuit Court for the Southern District of California has no jurisdiction of such a suit by a Missouri corporation against an Illinois corporation, although the latter was organized for the purpose of doing business in the southern district of California, and has its principal office there; and the fact that defendant filed an answer on the merits would not authorize the maintenance of such a suit, for this would be to give jurisdiction by consent in a case not within the general jurisdiction of the Court: St. Louis Ry. Co. *v.* Pacific Ry. Co., Circuit Court S. D. California, ROSS, Dist. J., November 18, 1892, 52 Fed. Rep., 770.

REMOVAL OF CAUSES.

5. *Separable Controversy—Joint Defendants.*

An action for wrongful arrest and imprisonment and for malicious prosecution, instituted in a State court against two defendants jointly, cannot be removed by either into the federal court, under Act March 3, 1875, Section 2, upon the ground of a separate controversy; and the fact that the defendant seeking removal has filed separate defenses does not make such cause of action separable: O'Harron *v.* Henderson, Circuit Court Dist. of Indiana, BAKER, Dist. J., October 10, 1892, 52 Fed. Rep., 769.

RES JUDICATA.

6. *Motion to Set Aside Default.*

The denial of a motion to set aside a default is not res judicata, and the motion may be renewed by leave first obtained on good cause shown. Jensen *v.* Barbour, Supreme Court of Montana, DEWITT, J., November 28, 1892, 31 Pac. Rep., 592.

SUMMONS.

7. *Service—What Constitutes.*

A summons directed to the defendant was served upon another person. The latter mailed to the defendant the copy served upon him, and

the defendant received it by mail. *Held*, no service, and, judgment having been entered on default, the defendant was entitled to set it aside as void on motion, without showing a meritorious defense: Savings Bank of St. Paul *v.* Arthur *et al.*, Supreme Court of Minnesota, DICKINSON. J., December 27, 1892, 53 N. W. Rep., 812.

PROPERTY.

Cases selected by ALFRED ROLAND HAIG.

REAL PROPERTY.

See WILLS 1, 2.

CONVERSION.

1. *Effect of on Lien of Dower and Judgments.*

Trustees, under a deed of trust, were directed "to bid in and purchase at sheriff's sale any or all the real estate of one M., a debtor of the parties to the deed of trust, if in their opinion it should become necessary in order to secure the interests of said parties, and to take a deed or deeds therefor from the sheriff in the name of said trustees for the use of said parties, upon trust to hold said lands for the purpose of making sale thereof, and that said trustees will make sale as early as practicable for the purpose of converting the same into money, at either public or private sale, for such prices and on such terms as they shall deem best . . . and that said trustees will from time to time pay over to said parties the proceeds of such sales, to be divided among them in proportion to their several and respective interests in said judgment: *Held*, That the effect of this agreement was to place the title of the real estate when purchased in the trustees named for the purpose of sale; that this was a conversion, and that the property purchased was not bound by the lien of judgments against any of the beneficial parties, nor by the dower of the wives of any of the *cestuis que trustent*, not parties to the agreement. Hunter *v.* Anderson, Supreme Court of Pennsylvania, PAXSON, C. J., January 3, 1893, 31 W. N. C., 386.

DEED.

2. *Conveyance to Municipality for Public Park.*

A conveyance to the village of Moorhead, its successors and assigns, in consideration of one dollar, of land "to be forever held and used as a public park," does not pass an absolute title so as to permit the erection of a prison thereon by the grantee: Flaten *v.* City of Moorhead, Supreme Court of Minnesota, COLLINS, J., December 8, 1892, 33 N. W. Rep., 807.

HOMESTEAD.

3. *Severance of Exempt Homestead Building by Trespasser, Effect of.*

A building which is exempt from levy and sale as an appurtenant of an exempt homestead does not lose its exempt character by the wrongful severance thereof from the realty by a trespasser; but after a severance the owner may sue for its conversion as personal property: Wylie *v.* Grundysen, Supreme Court of Minnesota, VANDERBURGH, J., November 23, 1892, 53 N. W. Rep., 805.

LATERAL SUPPORT.

4. *Removal of, by Company—Eminent Domain.*

Where a railroad company in constructing its right of way removes by excavation the lateral support to adjoining land, such removal is a taking, and the right so to appropriate can be acquired only by purchase or condemnation: McCullough *v.* St. Paul, etc., Rwy. Co., Supreme Court of Minnesota, GILFILLAN, C. J., December 17, 1892, 53 N. W. Rep., 802.

PERSONAL PROPERTY.

See WILLS, 4.

WILLS, EXECUTORS AND ADMINISTRATORS.

Cases selected by MAURICE G. BELKNAP.

CONSTRUCTION.

1. *"Revert"—Contingent Remainder.*

Where a testator devised land to his wife during widowhood, and directed that at her death or marriage it should "revert" to his children "according to the laws of the State," and that at their death it should be divided among their children," *held*, that if the word "revert" was used technically in the will, testator's children took a fee simple under the statute of descents, and subsequent limitations over were void, while if the word "revert" was used in the sense of "go to," testator's children took a contingent remainder, which vested on the death of the widow, and the subsequent limitation to the children of testator's children was void because limited on a contingent remainder: Robinson *v.* Ostendorff, Supreme Court of South Carolina, MCGOWAN, J., December 1, 1892, 16 S. E. Rep., 371.

DEVISE.

2. *Estate in Fee Simple—Limitation Over.*

Testator gave the residue of his estate to his wife and "her heirs forever," with the proviso that whatever of the same, if any, should be left by her, not used for her support and comfort, should go to a certain church. *Held*, that the gift to the wife was an express gift in fee which could never be reduced to a life estate by implication, and that the limitation over, therefore, to the church was void: Central Methodist Episcopal Church *v.* Harris, Supreme Court of Errors of Connecticut, CARPENTER, J., June 30, 1892, 25 Atl. Rep., 456.

DISTRIBUTION.

3. *French Spoliation Claims.*

The Act of Congress of March 3, 1891, making appropriations to pay claims for French spoliations prior to July 31, 1801, reported to Congress by the Court of Claims, contained the proviso, "that in all cases where the original sufferers were adjudicated bankrupts, the award shall be made in behalf of the next of kin, instead of to assignees in bankruptcy, and the awards, in the cases of individual claimants, shall not be paid

until the Court of Claims shall certify to the secretary of the treasury that the personal representatives on whose behalf the award is made represent the next of kin, and the courts which granted the administrations respectively shall have certified that the legal representatives have given adequate security for the legal disbursement of the awards." *Held*, that it was not intended to make a direct gift to the next of kin, but a payment to the estate of the original claimant which descended by the ordinary course of distribution: *In re* Leffingwell's Estate, Supreme Court of Errors of Connecticut, ANDREWS, C. J., November 21, 1892, 25 Atl. Rep., 453.

LEGACY.

4. *Bequest of Stocks in Remainder—Right of Life Tenant to Possession.*

Where there is a bequest of money, or stocks, or bonds in remainder, the life tenant is generally not entitled to possession, the executor retaining control, but this rule of construction will be disregarded if the opposite intention is apparent from the entire will: Watkins' Ex'rs *v.* Snadon, Court of Appeals of Kentucky, HOLT, C. J., December 5, 1892, 20 S. W. Rep., 700.

5. *Description of Corporation as Legatee.*

A bequest to a corporation will not fail where there has been a misnomer, if the description is sufficient with the aid of extrinsic evidence to enable the Court to identify the legatee with entire certainty. Moore's Ex'r *v.* Moore, Court of Chancery of New Jersey, VANFLEET, V. C., December 5, 1892, 25 Atl. Rep., 403.

6. *General Legacy—Direction to Purchase Mortgage.*

A direction to invest a certain sum of money in the purchase of a particular mortgage is a general, not a specific, legacy: Moore's Ex'r *v.* Moore, Court of Chancery of New Jersey, VANFLEET, V. C., December 5, 1892, 25 Atl. Rep., 403.

REVOCATION.

7. *Statute Requiring Provision for Children—Evidence of Intention to Provide.*

Where a statute providing that a testator shall be deemed to die intestate as to such child or children not named or provided for in his will, is construed not to compel a testator to make any substantial provision for his children, but simply to provide against any children being disinherited through inadvertence of the testator at the time he makes his will, extrinsic proof is admissible to show that the provision of a testator's will devising all his property to his "wife and to her heirs forever" was intended by him as such a provision as would take the will out of the operation of the statute: Bower *v.* Bower, Supreme Court of Washington, HOYT, J., November 18, 1892, 31 Pac. Rep., 598.